RECENT DECISIONS

CARRIERS—INJURY TO ONE RIDING ON FREIGHT TRAIN BY EMPLOYEE'S INVITATION NOT ACTIONABLE UNLESS WILFULL OR WANTON.—Decedent, an independent contractor employed to furnish cross-ties to defendant, was permitted by implied license, to ride upon the latter's passenger trains free of charge. Upon the invitation of the conductor in charge, decedent was riding on defendant's freight train. There was no caboose attached and he was riding with the train crew on top of a box car, which was derailed, due to defective track, decedent being killed as a result. Plaintiff, his widow, brought an action against the defendant company for damages, alleging that decedent was a licensee, whereupon defendant averred that he was a trespasser and that the conductor had no authority to invite him to ride. *Held,* no recovery. *Ocilla Southern R. Co.* v. *Faircloth* (Ga.), 110 S. E. 46 (1921).

For a general discussion of the principles involved in this case see 2 VA. LAW REVIEW 300; 3 VA. LAW REVIEW 464.

CONTRACTS—IMPOSSIBILITY OF PERFORMANCE—GOODS REQUISITIONED BY THE GOVERNMENT—SELLER EXCUSED FROM PERFORMANCE.—Defendant contracted to manufacture, sell and deliver to plaintiff certain woolens by a set date. When partial delivery had been made according to the agreement, the late war being in progress, army officials, acting under the National Defense Act, demanded that the defendant accept such an amount of government contracts and give them precedence, that defendant was unable to perform its contract as agreed upon with plaintiff. Plaintiff brought this action against the defendant for damages for failure to comply with its contract. *Held,* no recovery. *Mawhinney* v. *Millbrook Woolen Mills* (N. Y.), 132 N. E. 93 (1921).

Cases of this character have arisen mostly following the late war, and present on the one hand rights of the seller to rescind, and on the other, rights of the buyer to rescind.

Upon facts nearly identical with the instant case the same holding is found. *Roxford Knitting Co.* v. *Moore & Tierney,* 265 Fed. 177, 11 A. L. R. 1415 (1920); *In re Shipton,* L. R. 3 K. B. 676 (1915); see also *Underwood* v. *Hines* (Mo.), 222 S. W. 1037 (1920).

But where the seller had reasonable time to perform before government interference rendered further performance impossible, the seller was held liable. *Crown Embroidery Works* v. *Gordon,* 180 N. Y. S. 158, 190 App. Div. 472 (1920). Where the seller is thus delayed or can only make partial performance because of these war measures, it often arises that it is the buyer and not the seller who wishes to escape liability. In a case where only partial shipment could be made under these circumstances, the buyer refused to accept, and the court upheld him. *Prescott* v. *Powles* (Wash.), 193 Pac. 680 (1920). While both parties under these conditions are innocent, yet governmental control cannot alter the terms of the contract so as to make non-performance amount to performance. *Brooke Toole Co.* v. *Hydraulic Co.,* 89 L. J. K. B. N. S. 263, 9 A. L. R. 1507 (1919).

And where there is no exception for the obstruction or delay of delivery in the contract, a contract, by which goods are to be delivered

promptly, but are delayed some time by reason of an act of the government in the prosecution of a war, may be considered as broken by the seller, entitling the buyer to refuse acceptance. *Standard Scale, etc., Co.* v. *Baltimore Enamel, etc., Co.* (Md.), 110 Atl. 486, 9 A. L. R. 1502 (1920); *Primos Chemical Co.* v. *Fulton Steel Corp.*, 266 Fed. 945 (1920). Also where a vessel failed to complete its voyage in order to save itself and cargo from the dangers of war, the vessel owner was entitled to no freight, there being no delivery as contracted for. *The Harriman*, 9 Wall. (U. S.) 161 (1869). Finally where liability for non-performance may be excused, still impossibility of performance can never be treated as equivalent to performance so as to entitle one to affirmative relief. Note, 21 L. R. A. 645.

CONSTITUTIONAL LAW—CLASS LEGISLATION—VALIDITY OF STATUTE WHICH GIVES PREFERENCE TO VETERANS.—The plaintiff desired to be appointed to a vacancy in the police department in the city of New York under the civil service laws. A statute provided that preference in appointment and promotion in the civil service was to be given to persons who had served in the Army or Navy of the United States. The plaintiff passed the regular competitive examination, and his name had been placed as one of the three highest on the list of those eligible for appointment; but he had had no military record. The three names highest on the list were those of men who had had no military record. In compliance with the statute the Municipal Civil Service Commission was about to certify the names of three men who served in the Army during the recent war to the police commissioner for appointment, these men having had their names placed on the list by having passed an examination in compliance with the statute. The plaintiff sued for a writ of mandamus to compel the members of the Municipal Civil Service Commission to certify the three names standing highest on the list to the police commissioner for appointment, contending that the statute giving preference to veterans was unconstitutional and void. The Constitution of the State of New York provided that preference in appointment and promotion in the civil service was to be given to veterans who had served in the military forces of the United States during the Civil War (Art. 5, § 9). *Held*, the statute is unconstitutional; and the application for a mandamus granted. *Barthelmess* v. *Cukor* (N. Y.), 132 N. E. 140 (1921).

The legislative power of the State extends to every subject of legislation, except in particular cases where such power is expressly or impliedly limited by the constitution of the State, or by the Constitution of the United States. *McPherson* v. *Blacker*, 146 U. S. 1 (1892); *Couk* v. *Skeen*, 109 Va. 6, 63 S. E. 11 (1908).

Statutes giving veterans preference in appointment to office are generally held valid under the usual State constitution. *State ex. rel. Cowden* v. *Miller*, 66 Minn. 90, 68 N. W. 732 (1896); *Opinion of Justices* 166 Mass. 589, 44 N. E. 625, 34 L. R. A. 58 (1896); *Goodrich* v. *Mitchell*, 68 Kan. 765, 75 Pac. 1034, 64 L. R. A. 945, 104 Am. St. Rep. 429, 1 Ann. Cas. 288 (1904). But in these three cases there was nothing in the several constitutions to regulate the formation of the civil service. It is well settled that statutes giving preference to veterans in appointment in the civil service are not void as violating provisions of the State constitutions